in such cases that the reviewing court have the advantage of all the expertise and judgment an agency can supply. But the *Crowther* court appears to have ignored the basic issue of whether a denial of a motion to quash a subpoena is even reviewable for alleged agency arbitrariness. Before remand for a statement of reasons is proper, a court must find itself permitted to review the action. Agency action on a motion to quash, because of de novo treatment in the district court, is exempt from treatment as an adjudication under the APA[87] and thus is not agency action subject to the requirement of a statement of reasons.[88] The order here in question was not retroactive and had no binding force in future proceedings; the companies had no vested interest in the preservation of the *Mississippi* approach without any deviation whatsoever. Of course the defendant in a Clayton Act action has a legitimate interest in availing itself of the subpoena powers of the FTC, and likewise, the subpoenaed companies have an interest in maintaining their competitive positions. Nevertheless, in the instant situation more than the conflicting interests of the immediate parties must be considered. Arguably, the court in *Crowther* ignored the public policy consideration militating against delay in the administrative process. In resolving the conflict between the right of the public and the parties to know reasons for administrative actions and the preservation of administrative flexibility in fulfillment of congressional purposes, courts are repeatedly called upon to balance interests. An apparently reasonable variation of a formerly approved ancillary procedure should not be made the cause of unreasonable delay in effectuating the policies of the Federal Trade Commission Act. Thus, in a subpoena enforcement case, it is arguable that even if the subpoena order is substantially different from the established form, once the district court has sustained it, a court of appeals should affirm in the interest of administrative expediency. A fortiori, in such a case, a court should not remand for more articulate reasons when there is not a significant departure from established practice. Both the court's authority and the wisdom of its decision are questionable.

Agency Decision which Ignores the Examiner's Decision

In *Cinderella Career & Finishing Schools v. FTC*[89] the Court of

87. APA § 5, 5 U.S.C. § 554 (Supp. V, 1970).

88. *See* FTC v. Hallmark, Inc., 265 F.2d 433 (7th Cir. 1959). A statement of reasons is required by the APA only for agency action which qualifies as an adjudication. See note 63 *supra*.

89. 425 F.2d 583 (D.C. Cir. 1970).

Appeals for the District of Columbia Circuit attempted to delimit the scope of agency discretion to make factual determinations. The Federal Trade Commission had charged Cinderella with false, misleading, and deceptive representations to entice prospective students into its program. After 16 days of hearings, an examiner, analyzing voluminous documentary and testimonial evidence, concluded that the charges should be dismissed.[90] The Commissioners, stating their intention "to examine firsthand and independently the challenged representations contained in respondent's advertisements rather than relying on the analysis thereof contained in the initial decision,"[91] reversed the hearing examiner on six of the original charges.[92] The court of appeals reversed and remanded for further proceedings on the grounds that the procedure adopted by the Commission denied due process,[93] holding that the FTC, in reviewing a hearing examiner's initial decision, may not totally disregard evidence adduced at the hearing and the examiner's analysis thereof.[94]

The Commission's order, viewed as a whole, reveals that the agency actually considered the hearing examiner's findings and analysis, merely finding them unpersuasive when juxtaposed with advertisements which, in the Commissioners' view, were patently deceptive.[95] Indeed, the Commission's opinion referred at length to the

90. *Id.* at 584. The hearing was reported in 18,810 pages of transcript. The Commission called 29 witnesses and introduced 157 exhibits; Cinderalla questioned 23 witnesses and introduced 90 exhibits. The hearing examiner's initial decision encompassed 93 pages.

91. School Serv. Inc., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,576, at 20,906 (FTC 1968).

92. *Id.* at 20,904.

93. 425 F.2d at 585 n.3, 589.

94. *Id.* at 585. As an alternative ground for its disposition of the case, the court found that public statements previously made by Chairman Dixon indicated pre-judgment of the case and that his failure to excuse himself from participation in the review of the initial decision voided the review proceedings. *Id.* at 589-92. The court found that Dixon's statements met the test for disqualification laid down in Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959), that "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." The court also noted that Dixon had previously been disqualified for similar conduct, Texaco Inc. v. FTC, 336 F.2d 754, 759-60 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965), in which the *Gilligan* standard, *supra*, had been applied. For Chairman Dixon's published views on the policy questions involved, see Dixon, *"Disqualification" of Regulatory Agency Members: The New Challenge to the Administrative Process*, 25 FED. B. J. 273 (1965). *See also* Law, *Disqualification of SEC Commissioners Appointed From the Staff:* Amos Treat, R.A. Holmon, *and the Threat to Expertise*, 49 CORNELL L.Q. 257 (1964); Lemov, *Administrative Agency News Releases: Public Information Versus Private Injury*, 37 GEO. WASH. L. REV. 63 (1968).

95. *See, e.g.* [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,576, at 20,906.

testimony of numerous witnesses in rejecting the examiner's evaluation of its significance.[96] Inexplicably, the court later characterized this testimony as "entirely disregarded" by the agency.[97] In addition, at two points the agency's report and order flatly stated that the Commissioners had reviewed the record in arriving at their ruling.[98] Thus, although the Commission adopted its own independent analysis of the advertisements as the basis of its decision, it clearly did consider the record below in reaching this decision.

Prior case law vindicates such a practice.[99] The issue was whether the advertisements had the capacity to deceive, not whether anyone was in fact deceived.[100] It has been repeatedly held that consumer testimony does not necessarily control a determination of whether an advertisement possesses such capacity.[101] In *Cinderella* the Commission not only considered the consumer and expert testimony but gave it weight where probative[102] and amply catalogued the respects in which it found the examiner's handling of portions of the testimony deficient.[103] The court's mistaken impression that relevant evidence had been ignored was undoubtedly produced by poor phrasing in the agency report and order[104] but should have been dispelled by careful consideration of the entire document.

Although the court's analysis of the facts left much to be desired, its examination of the applicable FTC regulations as they relate to due process concepts filled a void in existing jurisprudence and deserves further analysis. Restated, the precise holding was that the

96. *Id.* at 20,910-13.

97. 425 F.2d at 585.

98. *See* [1967-1970 Transfer Binder] TRADE REG. REP. at 20,906, 20,914.

99. *See, e.g.*, Bakers Franchise Corp. v. FTC, 302 F.2d 258, 261 n.3 (3d Cir. 1962); Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961).

100. [1967-1970 Transfer Binder] TRADE REG. REP. at 20,907.

101. *See also* Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944); Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1076 (1967).

102. [1967-1970 Transfer Binder] TRADE REG. REP. at 20,913-14.

103. *Id.* at 20,906, 20,907.

104. In addition to the quotation in the text accompanying note 91 *supra*, the agency opinion contained the following two misleading statements:

> [I]n view of our decision to independently analyze — and without assistance from consumer or other witnesses—the challenged advertisements and their impact . . . it becomes unnecessary to review the testimony of these expert and consumer witnesses. *Id.* at 20,907. [F]or the reasons stated above the Commission will rely on its own reading and study of the advertisements to determine whether the questioned representation has the capacity to deceive. *Id.* at 20,909-10.

See also 48 TEXAS L. REV. 1385 (1970).

Federal Trade Commissioners must consider the decision of the hearing examiner and the evidentiary record upon which it is based rather than completely ignore them. Unless the Commission has as full an awareness of all the evidence as the hearing examiner, it may not reject that officer's initial decision.[105] Such a conclusion was premised on the need for preserving meaningful hearing procedures which give both the agency and the responding party a fair and equal opportunity to present exhibits and witnesses in support of their arguments.[106] In the court's view, empowering the Commission to draw independent conclusions while ignoring the record previously made would render the adversary hearing before the examiner a ritualistic exercise.[107] To buttress this conclusion the court cited certain of the Commission's own regulations which seemed to require the Commissioners to consider the entire record.[108] Although these same regulations stipulated that the Commissioners might exercise the powers they could have exercised had they made the initial decision,[109] the court found that such a rule did not encompass the option of completely ignoring the testimony of witnesses and the findings of the examiner.[110] Rather, the regulation simply meant that the reviewing Commissioners had great latitude to disagree with the examiner. In conclusion, the court noted two practical reasons for its holding: first, that disregarded testimony might be extremely relevant since the capacity to mislead the target group—teenage girls—might be better evaluated by the consumers themselves or experts rather than the Commissioners;[111] second, that a reviewing court would otherwise have difficulty meeting the *Universal Camera Corp. v. NLRB*[112] requirement that it consider the entire record in determining whether the agency's decision was supported by substantial evidence.[113] If the Commission were allowed to make its determination without considering all the evidence, courts would be left with the difficult task of secondhandedly meshing the evidence adduced at the hearing examination with cryptically enunciated

105. 425 F.2d at 585 n.3.
106. *Id.* at 587.
107. *Id.* at 588.
108. *Id.; see* 16 C.F.R. § 3.54(a) & (b) (1970).
109. 16 C.F.R. § 3.54(a) (1970).
110. 425 F.2d at 589.
111. *Id.* at 586. *But cf.* 80 HARV. L. REV., *supra* note 101, at 1076-78.
112. 340 U.S. 474 (1951).
113. 425 F.2d at 588.

Commission conclusions. Such, noted the court, was not the role envisioned for courts reviewing agency findings merely to determine if they are supported by substantial evidence. The court's arguments were based upon sound policy considerations and substantial legal authority, although little authority was cited.[114] In addition, other arguments might have been used by the court to bolster its decision.

Little exception can be taken to the construction of the regulation in question. The rules of procedure governing FTC adjudications read in part: "Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented . . . ."[115] In the absence of contrary judicial construction[116] it seems appropriate to give this statement its plain meaning. The straightforward language of the section is mandatory: the Commission *will consider* the record. A corresponding section of the Administrative Procedure Act on which this section is undoubtedly patterned imposes the same requirement on all federal agencies.[117] The trier of fact cannot arbitrarily reject items of evidence since such an exclusion obviously violates the very

114. *Id.* at 588. The court's principal source of authority was the Commission regulation, 16 C.F.R. § 3.54 (1970). For each of the four major propositions on which it based its holding, the court cited few or no cases although it did dispute the meaning of one substantial body of case law pressed upon it by the Commission, 425 F.2d at 587 n.5. The Commission cited those cases for the proposition that "[t]he meaning of advertisements and their tendency or capacity to deceive are questions of fact to be determined by the Commission whose determination should be upheld unless clearly wrong."The court attempted to distinguish such cases on the basis that the use of the term "Commission" therein referred to the entire commission process, including review by the Commission of the entire record, not to the Commissioners. *Id.* at 586, 587. This rationalization is inadequate. The cases make no formal distinction between the two terms and are essentially reaffirmations of the traditional principle that purported agency expertise renders factual determinations of the Commissioner's decision conclusive if supported by substantial evidence. *See, e.g.*, Stauffer Labs. v. FTC, 343 F.2d 75 (9th Cir. 1965). One case, however, dealt with a narrower question closely related to problems in *Cinderella*. In Bakers Franchise Corp. v. FTC, 302 F.2d 258 (3d Cir. 1962), substantial consumer testimony was marshalled on both sides of the question of capacity to deceive. The Commission then asserted its right to find on its own authority that the advertisements were deceptive and misleading. In the words of the court, "this method of reaching a conclusion was correct." *Id.* at 261. In *Bakers*, however, the fact that the Commission had given some consideration to the consumer testimony involved was not controverted. Since it seems that the *Cinderella* court was wrong in its assertion that the FTC had not considered consumer testimony, see notes 95-104 and accompanying text, the *Bakers* principle should control.

115. *See* 16 C.F.R. § 3.54(a) (1970).

116. No cases were found construing this particular portion of the Commission's regulations.

117. Administrative Procedure Act § 7, 5 U.S.C. § 557 (Supp. V, 1970).

rudiments of fair play and due process.[118] This is not to say that the Commission must decide in accordance with any of this evidence or the conclusions drawn from it by the hearing examiner since the remaining portion of the relevant Commission regulation reads: "the Commission . . . in addition, will, to the extent necessary or desirable, exercise all the power which it could have exercised if it had made the initial decision."[119] This section of the regulation clearly states that the ultimate product of the decisional process is not committed to the hearing examiner.[120] In the language of one court, "[t]he examiner's findings are not sacrosanct; there is no mandate that the Commission accept them."[121] But the agency must accord fair hearing and consideration to all points of view. No specific quantum of weight is necessarily accorded to any of the evidence adduced at the hearing.[122] If such were required it would in many instances "be the examiners and not the agency who make ultimate policy, and thus the coherence and responsibility of the administrative scheme would be impaired."[123]

These principles come into even sharper focus upon consideration of the Supreme Court's landmark decision in *Universal Camera Corp. v. NLRB.*[124] Although that case was primarily concerned with judicial review of final agency action, its determination involved an explication of questions also present in *Cinderella.* The Court stated that a reviewing court, when determining whether an agency's decision was supported by substantial evidence, should consider the initial findings of the hearing examiner as part of the record[125] and afford them such credence as they "intrinsically command," no more and no less.[126] The clear warning to the agencies was that they must consider and attribute some significance to the examiner's findings to assure likely affirmance on judicial review.[127] Subsequent cases have

118. *Cf.* The Chicago Junction Case, 264 U.S. 258, 265 (1924) ("The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it."); *accord,* Donnelly Garment Co. v. NLRB, 123 F.2d 215, 224 (8th Cir. 1941).

119. 16 C.F.R. § 3.54(a) (1970).

120. Warehousemen & Mail Order Employees, Local No. 743 v. NLRB, 302 F.2d 865, 869 (D.C. Cir. 1962).

121. United States Retail Credit Ass'n v. FTC, 300 F.2d 212, 217 (4th Cir. 1962).

122. *Cf.* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 10.04 at 18 (1965) [hereinafter cited as DAVIS]; L. JAFFE, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 611 (1965).

123. L. JAFFE, *supra* note 122, at 613.

124. 340 U.S. 474 (1951).

125. *Id.* at 493.

126. *Id.* at 495.

127. *See generally* L. JAFFE, *supra* note 122, at 610-13.

continued to apply this requirement.[128]

Policy reasons for the court's requirement in *Cinderella* readily suggest themselves. The proposition is well settled that the appropriate role for a court in reviewing agency action does not include either the renewed taking of evidence[129] or the copious reevaluation of evidence previously presented to the agency.[130] Indeed, these are two of the functions which in large part justify the existence of the agency in the first instance. The failure of the reviewing agency to consider all available data initially unduly complicates the task of the reviewing court under the substantial evidence rule. Requiring the court to engage in a minute search of the hearing record to determine if it squares with ambiguous Commission conclusions is at the very least extraordinarily wasteful of precious judicial time even if not "impossible" or "inappropriate"[131] and may in certain circumstances violate the Constitution.[132] Additionally, the framers of the APA intended that the requirement of review by the judiciary upon the whole record should mean that "courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case."[133] Though there are many

128. *See, e.g.*, FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955).

129. *See* NLRB v. Southland Mfg. Co., 201 F.2d 244 (4th Cir. 1952).

> [In reviewing a judge's findings] we are given power to review the facts, whereas, in [reviewing administrative findings], our power is limited to setting aside the findings of the agency if not supported by substantial evidence. . . . . If Congress had intended to give a power of review similar to that on appeals in equity, it knew perfectly well how to do so, as shown by the provision for review of tax court decisions . . . . The proposition was fully considered and was rejected because the effect of its adoption would have been to destroy the unified administration attained by the creation of a single agency and to make of the eleven courts of appeal eleven super agencies. *Id.* at 246.

Accord, Rosedale Coal Co. v. Director of United States Bureau of Mines, 247 F.2d 299, 305-06 (4th Cir. 1957).

130. *See* 4 DAVIS § 29.01: "the main inquiry is whether on the record the agency could reasonably make the finding."

131. See notes 129-30 *supra* and accompanying text.

132. A constitutional court "cannot participate in the exercise of functions that are essentially legislative or administrative." *See* Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930). "If a federal court is requied to do all over again what the agency has done, the system of review violates Article III of the Constitution." *Id.* at 469. *See also* 4 DAVIS § 29.10. "The reason for the holdings that nonjudicial functions may not be reviewed *de novo* is not that a court is lacking in qualification to make findings of fact from conflicting evidence but that a court may be lacking in qualification to take over the *discretionary power.*"

133. S. DOC. NO. 248, 79th Cong., 2d Sess. 214 (1946). The Supreme Court made clear in *Universal Camera* that it literally interprets both the words of the statute and the words of the Committee Reports. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). *See also* 4 DAVIS § 29.03 (1965).

respects in which the roles of reviewing court and reviewing agency are dissimilar,[134] this requirement should also be applied to the agency.[135] Otherwise, as the *Cinderella* court pointed out, a party may be deprived of its only opportunity to make a presentation of those elements it considers most favorable to its case.

Lack of consideration of initial decisions also detracts from the importance and prestige of the hearing examiner. Great effort has been expended to foster independence and competence in these officials[137] who have broad powers somewhat comparable to judges to issue subpoenas, order depositions, rule on offers of evidence, and take additional steps as authorized by law to conduct a proper hearing.[138] In the FTC, as in many other agencies, the examiner is authorized to make the initial decision which will become the decision of the agency unless appealed and reversed or stayed by the agency.[139] The examiner is thought particularly qualified to decide questions of relevance, credibility, and weight to be given conflicting testimony[140] and therefore the FTC and other agencies have been justifiably reluctant to reverse examiner decisions.[141] Allowing agencies to disregard completely the findings of these officers may severely hamper their effectiveness.

Agency review practices envisioned by the *Cinderella* court call to mind Chief Justice Hughes' pithy admonition that "an unscrupulous administrator might be tempted to say, let me find the facts for the people of my country and I care little who lays down the general

134. For example, the particularity with which the findings of the tribunal below are examined. See notes 129-33 *supra* and accompanying text.

135. *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 51 (1941): "In general the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law and policy should, of course, be open to full review." *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 492-97 (1950).

136. See note 107 *supra* and accompanying text.

137. *See generally* Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 FED. B.J. 351 (1967). The APA made the examiners independent of the agencies in tenure and compensation. 5 U.S.C. §§ 7521, 5335(a)(B) (Supp. V, 1970). Although the agencies may select their own examiners, their selections are limited to a list of rigorously qualified applicants maintained by the Civil Service Commission. *See also* Note, *The Status of the Trial Examiner in Administrative Agencies*, 66 HARV. L. REV. 1065 (1953).

138. 5 U.S.C. § 556 (Supp. V, 1970).

139. *Id.* § 557; 16 C.F.R. § 3.51(a) (1970), *as amended*, 35 *Fed. Reg.* 10656 (1970).

140. *See* 80 HARV. L. REV., *supra* note 101, at 1075.

141. *See* Auerbach, *The Federal Trade Commission: International Organization and Procedure*, 48 MINN. L. REV. 383, 467-68 (1964); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964).

principles."[142] Obviously, the finding of facts is a crucial step in achieving substantial justice for parties in administrative proceedings. The District of Columbia Circuit's opinion in *Cinderella* recognized the necessity for steering a course between according the findings of the hearing examiner a significance which might impair the policy-making function of the agency involved and completely ignoring those findings, thereby prejudicing the legitimate claims of parties and degrading the important function of the hearing examiner in the administrative process. What is required of the agency is a delicate exercise of restraint and a fine sensitivity not only to its own role in the application of administrative law but also to those of the trial examiner and the reviewing court. *Cinderella's* restatement of the applicable legal principles should clarify the problems involved and serve as protection for rights affected by the very significant power of an agency to find the facts.

VIII. JUDICIAL REVIEW—RIGHT OF REVIEW

Standing to Seek Judicial Review

Prior to 1970, two primary methods for obtaining standing to appeal a decision of a federal administrative agency existed.[1] Appellants could allege an invasion of an interest protected by the common law[2] or assert statutory authorization for judicial review.[3] Allegations of both were labeled "legal rights," a term defined by the Supreme Court in *Tennessee Power Co. v. TVA*[4] as rights of property,

142. Address by Charles Evans Hughes before the Federal Bar Association, *quoted in* LANDIS, THE ADMINISTRATIVE PROCESS 135, 136 (1938).

1. Note, *Standing to Challenge Federal Administrative Actions in the Wake of Association of Data Processing Service Orgainzations, Inc. v. Camp*, 1 LOYOLA U. (CHI.) L.J. 285, 289 (1970). The question should be distinguished from the ability of persons to intervene in administrative proceedings. Intervention is controlled by agency regulations; hence, permission to intervene is not necessarily recognition that a petitioner is a sufficiently aggrieved party for standing purposes. FPC Order Issuing Preliminary Permit and Granting Petition to Intervene, Project No. 2702 (Nov. 18, 1970). See ANCILLARY MATTERS section of the *Project supra*.

2. Tennessee Power Co. v. TVA, 306 U.S. 118, 137 (1939).

3. *See, e.g.*, Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135b(d) (1964) ("any person who will be adversely affected by such an order may obtain judicial review"); Federal Power Commission Act, 16 U.S.C. § 8251(b) (1964) ("any party . . . aggrieved by an order . . . may obtain a review of such order in the United States court of appeals"). *But see* Sugar Act of 1947, 7 U.S.C. § 1136 (1964), for an example of statutory preclusion of judicial review.

4. 306 U.S. 118 (1939).